

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32956

STATE OF IDAHO,	)	
	)	<b>2007 Opinion No. 81</b>
Plaintiff-Respondent,	)	
	)	<b>Filed: December 5, 2007</b>
v.	)	
	)	<b>Stephen W. Kenyon, Clerk</b>
CHRISTOPHER DAVID FLEGEL,	)	
	)	
Defendant-Appellant.	)	
_____	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Judgment of conviction for sexual abuse of a child under the age of sixteen, vacated; case remanded.

Hampton & Elliott, Boise, for appellant. Teresa A. Hampton argued.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent. Jessica M. Lorello argued.

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WALTERS, Judge Pro Tem

Christopher David Flegel appeals from his judgment of conviction for sexual abuse of a child under the age of sixteen. For the reasons set forth below, we vacate Flegel's judgment of conviction and remand for a new trial.

I.

FACTS AND PROCEDURE

Flegel was an airline employee with the duty of assisting a ten-year-old girl, K.J., during her layover at the airport. When K.J. reached her destination, she told her parents that Flegel had touched her inappropriately while she was trying to sleep on some chairs in the airport terminal. K.J.'s parents contacted the police, and the state presented the testimony of K.J. and a police detective to a grand jury. The grand jury indicted Flegel on one count of lewd and lascivious conduct with a minor under the age of sixteen in violation of I.C. § 18-1508 for having manual-genital contact with K.J. At trial, the prosecutor requested that the district court also instruct the

jury on the crime of sexual abuse of a child under the age of sixteen, I.C. § 18-1506, as a lesser included offense of lewd and lascivious conduct. Flegel's counsel objected to the state's proposed instruction. However, Flegel's counsel stated that he was "okay" with amending the indictment and instructing the jury that it should find Flegel guilty of lewd conduct if it found that he had touched K.J.'s vagina and find him guilty of sexual abuse of a child if the jury found that he only rubbed her buttocks. The state did not amend the indictment, but the district court instructed the jury on both offenses. The jury acquitted Flegel of lewd and lascivious conduct but did not reach a verdict on sexual abuse. The district court declared a mistrial on the offense of sexual abuse.

The state moved to amend the indictment to charge Flegel with sexual abuse of a child and Flegel objected. Flegel asserted that the district court should not have instructed the jury on sexual abuse of a child because that crime is not a lesser included offense of lewd and lascivious conduct; that, even if the instruction was proper, retrial was barred by his right against double jeopardy; and that, even if the state could proceed on the sexual abuse charge, it must file a new charging instrument alleging the sexual abuse offense and take the matter before a magistrate or a grand jury for a probable cause finding. The district court rejected each of Flegel's arguments and granted the state's motion to amend the indictment. The state amended the indictment to remove the lewd conduct charge and include one count of sexual abuse of a child for having "sexual contact" with K.J. with the intent to appeal to Flegel's or K.J.'s sexual desires. At the second trial, a different jury found Flegel guilty of sexual abuse of a child. Flegel filed a motion for a new trial, asserting that his rights were violated because he was never formally arraigned on the amended indictment. The district court denied the motion. Flegel appeals.

## **II.**

### **ANALYSIS**

Flegel raises several issues in his brief. To resolve this appeal and provide guidance to the district court on remand, however, we need only address Flegel's arguments that the indictment was improperly amended, that the district court erred when it published to the jury a recorded interview of him by a detective, and that the district court subjected him to double jeopardy.

### **A. Amended Indictment**

Flegel maintains the district court made several errors regarding the amended indictment. Flegel asserts that his due process rights were violated and the district court lacked jurisdiction because he was never brought before a grand jury or magistrate for a probable cause finding or arraigned on the amended sexual abuse charge. Flegel also asserts that the state violated I.C.R. 7(e) by amending the indictment after the close of its evidence in the first trial.

In a criminal case, procedural due process does not guarantee errorless trials, but it does at least ensure that criminal trials shall be fundamentally fair. *State v. Gilman*, 105 Idaho 891, 893, 673 P.2d 1085, 1087 (Ct. App. 1983). Fairness requires that a criminal defendant be tried only upon charges of which he or she has notice. *Id.* Additionally, Article I, Section 8 of the Idaho Constitution provides that “no person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate.” An accused is therefore denied his or her constitutional right to a preliminary hearing where an indictment or information is filed or subsequently amended charging a crime of a greater degree or of a different nature than that for which he or she was held by the committing magistrate. *State v. O’Neill*, 118 Idaho 244, 249, 796 P.2d 121, 126 (1990); *State v. McKeehan*, 91 Idaho 808, 817, 430 P.2d 886, 895 (1967).

There is a well-recognized exception to these general rules. At common law, the prosecutor’s charge of a specific crime is viewed as giving presumptive notice of any lesser included offense. *State v. Padilla*, 101 Idaho 713, 716, 620 P.2d 286, 289 (1980). Additionally, I.C. § 19-2132(b) states that the trial court shall instruct the jury with respect to lesser included offenses provided that either party requests such an instruction and there is a reasonable view of the evidence presented in the case that would support a finding that the defendant committed such lesser included offense but did not commit the greater offense. *See also* I.C.R. 31(c). The lesser included offense doctrine has survived due process scrutiny. *See O’Neill*, 118 Idaho at 250, 796 P.2d at 127; *Gilman*, 105 Idaho at 895, 673 P.2d at 1089. The district court did not, therefore, violate Flegel’s due process rights if the amended charge of sexual abuse of a child was a lesser included offense of the lewd and lascivious conduct charge in the original indictment.

A lesser included offense is one which is necessarily committed while committing the crime charged or the essential elements of which are alleged as the manner or means by which

the charged offense has been committed. *State v. Drennon*, 126 Idaho 346, 352, 883 P.2d 704, 710 (Ct. App. 1994). When deciding whether an offense is necessarily included in the charged offense, the trial court must consider whether the facts alleged in the pleading instrument and the evidence adduced at trial show that the included offense occurred during commission of the charged offense. *Id.* Whether a crime is a lesser included offense of the crime charged is a question of law over which an appellate court exercises free review. *Id.*

The crime of lewd conduct with a minor specifically includes several types of sexual contact, including genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact. I.C. § 18-1508. Sexual abuse of a child requires proof of physical contact, *not amounting to lewd conduct*, which is intended to gratify the lust or sexual desire of the actor. *See* I.C. § 18-1506(1)(b), (3). It is clear from these definitions that the crime of sexual abuse of a child is not necessarily committed while committing the crime of lewd conduct. *State v. Colwell*, 124 Idaho 560, 565, 861 P.2d 1225, 1230 (Ct. App. 1993). However, depending upon the facts alleged in the pleading instrument and the evidence adduced at trial, the crime of sexual abuse may be considered by the jury as a lesser included offense if there is evidence that the included offense occurred during the commission of the charged offense. *Colwell*, 124 Idaho at 565, 861 P.2d at 1230. *See also State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992); *O'Neill*, 118 Idaho at 250, 796 P.2d at 127; *Drennon*, 126 Idaho at 354, 883 P.2d at 712.

The original indictment alleged that Flegel had manual-genital contact with K.J., which is specifically listed as a lewd and lascivious act in I.C. § 18-1508. The original indictment did not allege any other sexual contact. However, an audio recording of an interview of Flegel by a detective was admitted into evidence in the first trial. During that interview, Flegel indicated that he had rubbed K.J.'s back and his hand slid beneath K.J.'s underwear. Additionally, Flegel did not deny touching K.J.'s buttocks when the detective indicated that K.J. alleged he had done so in the course of touching her vagina. Touching a child's buttocks beneath his or her underwear is not an enumerated act of lewd conduct and could thereby constitute physical contact, not amounting to lewd conduct, which is intended to gratify the lust or sexual desire of the actor. The evidence presented in Flegel's first trial thus indicated that the offense of sexual

abuse of a child occurred during the commission of the charged offense of lewd conduct.<sup>1</sup> The district court properly concluded that sexual abuse of a child was a lesser included offense of lewd conduct based on the evidence presented at the first trial, and the district court did not violate Flegel's due process rights when it instructed the jury on the lesser included charge. After the jury failed to reach a verdict on the lesser included offense, the district court did not violate Flegel's due process right by permitting the state to amend the indictment without proceeding to a preliminary hearing on that offense. *See O'Neill*, 118 Idaho at 250, 796 P.2d at 127.

Flegel also asserts that the district court violated his rights by failing to arraign him on the lesser included charge of sexual abuse. Flegel made the same assertion in a motion for a new trial after the second trial. The district court ruled that, although Flegel had not been arraigned or entered a plea to the amended charge of sexual abuse, Flegel was not prejudiced by the lack of an arraignment on that charge. After an indictment or information has been filed with the district court, the defendant must be arraigned thereon by the court. I.C.R. 10(a). *See also* I.C. § 19-1514. Flegel was arraigned on the main charge of lewd conduct prior to his first trial. We have already held that Flegel's due process rights were not violated when the district court proceeded to a second trial on the unresolved lesser included offense without a preliminary hearing on that offense. Additionally, Flegel's counsel acknowledged at the time of his motion for a new trial that he was aware prior to the second trial that Flegel had not entered a plea on the amended charge, but he declined to object. Under these circumstances, we conclude that the district court

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<sup>1</sup> The transcript of the portions of the recording played to the jury at the first trial is not in the record before us, and the only audio recording of the interview available to us is the state's exhibit 13 from Flegel's second trial. The recording admitted into evidence at the second trial contained portions of the interview which were redacted from the recording submitted to the jury in the first trial. Additionally, the transcript for the first trial included in the appellate record does not contain K.J.'s testimony, and we are thus unable to determine exactly what type of sexual contact she testified Flegel had with her. Portions of a transcript missing on appeal are presumed to support the actions of the district court, and we could reject Flegel's argument for failing to provide the relevant portions of the transcript. *See State v. Repici*, 122 Idaho 538, 541, 835 P.2d 1349, 1352 (Ct. App. 1992). However, the parties' motions in limine and the district court's order from the second trial appear to indicate that Flegel's concessions to rubbing K.J.'s back and sliding his hand beneath her underwear were not redacted from the recording published to the jury at the first trial.

did not violate Flegel's rights by failing to arraign him on the lesser included offense prior to the second trial.

Flegel also asserts that the district court lacked subject matter jurisdiction over the indictment once he was acquitted of the only charge it alleged. The information, indictment, or complaint alleging an offense was committed within Idaho confers subject matter jurisdiction upon the court. *State v. Rogers*, 140 Idaho 223, 228, 91 P.3d 1127, 1132 (2004); *State v. Jones*, 140 Idaho 755, 757-58, 101 P.3d 699, 701-02 (2004). Generally, once acquired by the court, jurisdiction continues until extinguished by some event. *Rogers*, 140 Idaho at 228, 91 P.3d at 1132. *See also State v. Jakoski*, 139 Idaho 352, 354, 79 P.3d 711, 713 (2003). After the jury was unable to reach a verdict on the lesser included offense in Flegel's first trial, the district court did not dismiss the case. Rather, the district court declared a mistrial on the unresolved charge of sexual abuse of a child and set the case for a second trial. We hold that the district court did not lose subject matter jurisdiction over the case after the jury acquitted Flegel of the lewd conduct charge contained in the indictment but failed to reach a verdict as to the lesser included offense not specifically alleged in the indictment.

Flegel also asserts that the district court lost jurisdiction over the lesser included offense when the state failed to amend the indictment prior to resting its case in the first trial in violation of I.C.R. 7(e). Rule 7(e) provides that the "court may permit a complaint, an information or indictment to be amended at any time before the prosecution rests if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." The rule prohibits an amendment after the state has rested its case on the subject matter of the amendment. *State v. Smith*, 116 Idaho 553, 559, 777 P.2d 1226, 1232 (Ct. App. 1989). Thus, the state may not alter a charge, or add new charges, after the close of evidence. *Id.* Because Rule 7(e) does not make an exception for lesser included offenses, it could be read to impose a heightened notice requirement on the state above that required by a defendant's due process rights. This mechanical reading of Rule 7(e), however, ignores that I.C. § 19-2132(b) requires a trial court to instruct a jury on a lesser included offense under certain circumstances. *See also* I.C.R. 31(c). The reading of Rule 7(e) advanced by Flegel would render the requirement in I.C. § 19-2132(b) meaningless whenever the state fails to amend the charging instrument to reflect the required jury instruction on a lesser included offense until after the close of its case. Indeed, Flegel's reading would allow the state to defeat a defendant's attempt to have the trial court

instruct the jury on a lesser included offense by failing to amend the indictment prior to the close of its case. We hold that the lesser included offense doctrine applies to Rule 7(e) such that the state does not violate Rule 7(e) by failing to amend the information to add a lesser included offense prior to resting its case on the subject matter of that offense. Therefore, the district court did not lose jurisdiction over the lesser included offense after the state failed to amend the indictment to include that offense prior to resting its case.

**B. Admissibility of Recorded Interview with Detective**

Flegel also argues that the district court erred at his second trial when it published the recorded interview of him by the detective. The recording included statements by the detective where she expressed her opinion regarding the truth of K.J.'s allegations, and Flegel asserts that the district court therefore violated the rule that an expert witness is not permitted to testify regarding the truth or falsity of a victim's claims. *See State v. Cordova*, 137 Idaho 635, 639, 51 P.3d 449, 453 (Ct. App. 2002). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989). However, we review questions of relevance de novo. *State v. Raudebaugh*, 124 Idaho 758, 764, 864 P.2d 596, 602 (1993).

The district court redacted several of the detective's statements from the recording published at Flegel's first trial. Flegel filed a motion in limine prior to his second trial requesting that the district court again redact these statements, but the district court granted, in part, and denied, in part, Flegel's request.<sup>2</sup> The district court granted Flegel's request as to statements that the district court found improperly related to K.J.'s credibility scores on tests, placed the detective in the position of an expert vouching for K.J., or referred to a forensic interview that

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<sup>2</sup> A transcript of the entire recorded interview is not in the record before us. Because the district court's order regarding the motion in limine does not quote the transcript, we are unable to verify which statements were admitted and which were redacted. The parties' briefs, however, set forth the content of the statements that were not redacted. Our review is therefore based upon the audio recording published to the jury and the parties' representations of which redactions were denied.

indicated the existence of an independent and dependable source of truth. The district court denied Flegel's request as to certain portions of the interview where the detective either stated or implied that she knew the incident occurred and where she stated that K.J. was "so credible on how it happened." The district court ruled that these statements were relevant to provide context and were not unduly prejudicial. The district court also instructed the jury that what the detective said and her opinions were not evidence and were admitted only to provide context.

A suspect's answers to police questioning are only admissible to the extent that they are relevant. *Cordova*, 137 Idaho at 641, 51 P.3d at 455. *See also* I.R.E. 402. Thus, an interrogator's comments that he or she believes the suspect is lying are only admissible to the extent that they provide context to a relevant answer by the suspect. *Cordova*, 137 Idaho at 641, 51 P.3d at 455. Otherwise, interrogator comments that result in an irrelevant answer should be redacted. *Id.* In *Cordova*, this Court held that an officer's comments that he was an expert in deception detection were not necessary to give context to Cordova's answers. In contrast, the statements by two officers that they believed Cordova was lying were admissible because the comments gave context to Cordova's inculpatory statements, which were relevant to the proceedings. *Id.* The district court erred, however, when it failed to give a limiting instruction because the officers' statements were inadmissible for the purpose of proving the truth of the matter asserted--Cordova's truthfulness. *Id.*

In the present case, the detective's statements as to the credibility of K.J.'s allegations were admissible to provide context to Flegel's inculpatory responses. In direct response to the detective's repeated assertions that she believed K.J.'s allegations were true, Flegel denied touching K.J.'s vagina but did not deny touching her buttocks. Flegel has not directed us to any statements admitted by the district court wherein the detective indicated that she was an expert in determining the credibility of victims. Additionally, the district court in the present case properly instructed the jury that the detective's opinions were only admissible for the purpose of providing context to Flegel's responses. We conclude that the district court properly ruled that the statements were admissible only to provide context and find no abuse of discretion in the district court's ruling that the statements were not unduly prejudicial.

### **C. Double Jeopardy**

Flegel asserts that the second trial placed him in double jeopardy in violation of the Fifth Amendment to the United States Constitution and Article I, Section 13 of the Idaho



Constitution.<sup>3</sup> The Double Jeopardy Clause of the United States Constitution protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction and multiple punishments for the same offense. *State v. Osweiler*, 140 Idaho 824, 825-26, 103 P.3d 437, 438-39 (2004). Flegel asserts that the district court subjected him to factual double jeopardy by retrying him on the sexual abuse charge. Flegel also contends that the district court's jury instructions at his second trial subjected him to double jeopardy.

#### **1. Retrial on lesser included offense**

Flegel asserts that, once he was acquitted of lewd conduct, the subsequent prosecution for the lesser included offense of sexual abuse was barred because, according to Flegel, it was based on the same act. A retrial following a "hung jury" does not violate the Double Jeopardy Clause. *Richardson v. United States*, 468 U.S. 317, 324 (1984). *See also State v. Colwell*, 127 Idaho 854, 858, 908 P.2d 156, 160 (Ct. App. 1995) (retrial on lesser included offense of sexual abuse did not violate constitutional double jeopardy prohibition after jury acquitted defendant of lewd conduct and this Court vacated and remanded conviction on sexual abuse). Additionally, this Court has previously addressed whether a retrial is possible on lesser included offenses on which a jury is unable to reach a unanimous verdict after acquittal on the main charge. *See State v. Seamons*, 126 Idaho 809, 892 P.2d 484 (Ct. App. 1995). In *Seamons*, the jury in the first trial had acquitted Seamons of the main charge and failed to reach a verdict on the lesser included offense. This Court held that a defendant's interest in being free from multiple prosecutions and punishments is not violated by a subsequent trial within the course of the same prosecution to settle unresolved charges. *Id.* at 812, 892 P.2d at 487. The holding in *Seamons* was limited to those instances where a jury is instructed as to lesser included offenses and, while acquitting on the main charge, is unable to reach a unanimous verdict on one or more of the lesser included offenses. *Id.* We analyzed the double jeopardy argument in *Seamons* under I.C. § 18-301, and that provision has since been repealed. *See* 1995 Idaho Sess. Laws, ch. 16. However, I.C. § 18-301 provided a greater scope of protection than the constraints of double jeopardy found in the Idaho and United States Constitutions. *Seamons*, 126 Idaho at 811, 892 P.2d at 486.

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<sup>3</sup> Although Flegel contends that both constitutions were violated, he provides no cogent reason why Article I, Section 13 of the Idaho Constitution should be applied differently than the Fifth Amendment to the United States Constitution in this case. Therefore, the Court will rely on judicial interpretation of the Fifth Amendment in its analysis of Flegel's claims. *See State v. Osweiler*, 140 Idaho 824, 827, 103 P.3d 437, 440 (2004).

As in *Seamons*, the district court in the present case instructed the first jury on a lesser included offense and, while acquitting on the main charge, the jury was unable to reach a unanimous verdict on the lesser included offense. We are not persuaded by Flegel's assertion that he was subjected to factual double jeopardy pursuant to *Ashe v. Swenson*, 397 U.S. 436 (1970). *Ashe* stands for the proposition that the state may not try a defendant on a charge when a jury has already determined that there is a reasonable doubt as to the truth of the factual allegations underlying the charge. *See Ashe*, 397 U.S. at 446. In Flegel's first trial, the jury found that there was a reasonable doubt as to whether Flegel committed lewd conduct by having manual-genital contact with K.J., but the jury failed to reach a verdict as to whether Flegel committed sexual abuse by having sexual contact not amounting to lewd conduct.<sup>4</sup> Therefore, the jury did not find that there was a reasonable doubt as to the factual allegations underlying the lesser included offense of sexual abuse. We hold that the district court did not subject Flegel to double jeopardy by retrying him on the lesser included offense of sexual abuse because the jury at the first trial did not reach a verdict as to that offense or the factual allegations underlying that offense.

## **2. Jury instructions**

Flegel also asserts that the jury instructions in his second trial subjected him to double jeopardy by failing to adequately define the sexual contact element of the charge of sexual abuse of a child. Flegel did not object to the jury instructions on these grounds in the trial court, but he now argues that the instructions constituted fundamental error that this Court should address notwithstanding the lack of an objection below.

Idaho Criminal Rule 30(b) provides that "no party may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which the party objects and the grounds of the objection." In *State v. Anderson*, Docket No. 33827, slip opinion at p. 7 (Oct. 22, 2007), however, the Idaho Supreme Court held that jury instructions may be subject to limited review

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<sup>4</sup> Flegel has not included the jury instructions from the first trial in the appellate record. We must presume, therefore, that the district court properly instructed the first jury that it should find Flegel guilty of lewd conduct if he had manual-genital contact and sexual abuse if he had sexual contact not amounting to lewd conduct. *See State v. Beason*, 119 Idaho 103, 105, 803 P.2d 1009, 1011 (Ct. App. 1991).

for fundamental error. A fundamental error is “a due process violation that produced manifest injustice.” *Id.* In criminal trials, the state must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement. *Id.* See also *Middleton v. McNeil*, 541 U.S. 433, 437 (2004). The question whether the jury has been properly instructed is a question of law over which we exercise free review. *State v. Gleason*, 123 Idaho 62, 65, 844 P.2d 691, 694 (1992). When reviewing jury instructions, we ask whether the instructions as a whole, and not individually, fairly and accurately reflect applicable law. *State v. Bowman*, 124 Idaho 936, 942, 866 P.2d 193, 199 (Ct. App. 1993).

Instruction 16 stated the elements of the charge of sexual abuse of a child. One of those elements was that “the defendant, Christopher David Flegel caused or had sexual contact with” K.J. In pertinent part, Idaho Criminal Jury Instruction 922 for this element provides that the defendant “caused or had sexual contact with [name of child] not amounting to lewd conduct.” The comment to I.C.J.I. 922 indicates that, if sexual abuse of a child is not a lesser included offense, the words “not amounting to lewd conduct” should be omitted from the instruction. In Flegel’s second trial, sexual abuse of a child was not a lesser included offense, and the district court appears to have followed the comment to I.C.J.I. 922 in omitting the limiting phrase “not amounting to lewd conduct.” Flegel correctly asserts, however, that the district court should not have followed the comment to I.C.J.I. 922 in this case because limiting the definition of sexual contact to contact not amounting to lewd conduct was necessary to protect Flegel’s right against double jeopardy. The district court’s other instructions did not cure this double jeopardy problem. Indeed, Instruction 17 further defined “sexual contact” as “any physical contact . . . which is intended to gratify the lust or sexual desire of the actor or some other person.” Based on the instructions provided by the district court, the jury could have found Flegel guilty of sexual abuse at his second trial even if it found that the only sexual contact that he had was the manual-genital contact of which he had been acquitted. Therefore, the jury instructions subjected Flegel to double jeopardy.

We must next determine if the error constituted fundamental error. In *Anderson*, the jury instruction omitted an essential element from the felony witness harassment statute, thereby violating Anderson’s right to due process. The Court noted that, essentially, Anderson was convicted of a nonexistent crime, and the state failed to prove beyond a reasonable doubt the elements of the crime with which Anderson was charged. The Court held that “such

circumstances qualify as a clear instance of manifest injustice,” and “the error was fundamental.” *Anderson*, Docket No. 33827, slip opinion at p. 7. *See also State v. Swader*, 137 Idaho 733, 736, 52 P.3d 878, 881 (Ct. App. 2002) and *State v. Ayala*, 129 Idaho 911, 919, 935 P.2d 174, 182 (Ct. App. 1996) (double jeopardy violation may constitute fundamental error). In the present case, we conclude that it was manifestly unjust to subject Flegel to the risk of being found guilty for an act he had already been acquitted of committing and therefore fundamental error occurred.

This does not end our inquiry, however, because “even when a fundamental error has occurred, this Court will not reverse a conviction if the fundamental error was harmless.” *Anderson*, Docket No. 33827, slip opinion at p. 7. Idaho appellate courts have held that an error is harmless if the appellate court is able to say, beyond a reasonable doubt, that the jury would have reached the same result absent the error. *See State v. Field*, 144 Idaho 559, 572, 165 P.3d 273, 286 (2007); *State v. Boman*, 123 Idaho 947, 950-51, 854 P.2d 290, 293-94 (Ct. App. 1993). When applying this test, the appellate court independently reviews the untainted evidence to determine whether the state has demonstrated that the jury would have reached the same result absent the error. *See Field*, 144 Idaho at 572, 165 P.3d at 286; *Boman*, 123 Idaho at 951, 854 P.2d at 294. In *Anderson*, however, the Idaho Supreme Court set forth a slightly different harmless error test. The Court suggested that the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Anderson*, Docket No. 33827, slip opinion at p. 7. *See also Chapman v. California*, 386 U.S. 18, 23 (1967). This test, as set forth in *Chapman*, does not examine whether the jury would have reached the same result without the error but, rather, it looks to whether the error influenced the jury in reaching its verdict. *See* 3 Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, *Criminal Procedure* § 27.6(e) (2d ed. 1999). We recognize that, in addition to holding that the state failed to satisfy the *Chapman* test, the Court in *Anderson* also held that it could not “conclude beyond a reasonable doubt that the jury would have reached the same conclusion had it faced all of the statutory elements.” *Anderson*, Docket No. 33827, slip opinion at p. 8. However, because the Court set forth and applied the *Chapman* test in *Anderson*, we may not limit our harmless error

analysis to an independent review of the record to determine whether a rational jury would have reached the same result in Flegel's case with adequate jury instructions.<sup>5</sup>

The evidence at Flegel's second trial included the audio recording of the interview of him by the detective, which included Flegel's concessions that he rubbed K.J.'s back and slid his hand beneath her underwear. Flegel also responded "I guess so," when the detective asked if he intended to put his hand beneath K.J.'s underwear and failed to deny the accusation that he had touched K.J.'s buttocks. Given the overwhelming weight of this evidence that Flegel had sexual contact not amounting to lewd conduct, we can say, beyond a reasonable doubt, that a rational jury would have reached the same result even if it had been properly instructed that it could only find Flegel guilty for sexual contact not amounting to lewd conduct. K.J.'s testimony, however, included the assertion that Flegel had manual-genital contact with her. Because the district court instructed the jury that sexual abuse included *any* physical contact intended to gratify the lusts or sexual desires of Flegel or some other person, the jury likely relied upon K.J.'s testimony on manual-genital contact when it found Flegel guilty. We are thus constrained to hold that there is a reasonable possibility that the district court's inadequate instruction on the definition of sexual contact might have contributed to Flegel's conviction, and the erroneous jury instruction was not harmless.<sup>6</sup>

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<sup>5</sup> We note that several Idaho appellate decisions have applied the same harmless error test applied in *Anderson*. See e.g. *State v. Fernandez*, 124 Idaho 381, 383, 859 P.2d 1389, 1391 (1993) (holding that the test is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction, and that the court must be able to declare a belief that it was harmless beyond a reasonable doubt). In cases of federal constitutional error, the United States Supreme Court also appears to examine both whether the error contributed to the verdict and whether a rational jury would have found the defendant guilty absent the error. See e.g. *Neder v. United States*, 527 U.S. 1, 15-18 (1999).

<sup>6</sup> Flegel also asserts for the first time on appeal that Instruction 22(a) is inconsistent with Instruction 22(b). Instructions 22(a) and 22(b) regarded testimony by K.J. and the detective as to statements that they made prior to the second trial. Because the double jeopardy issue is dispositive, we need not determine whether these instructions also constituted fundamental error that prejudiced Flegel's case. We note, however, that these instructions inconsistently instructed the jury as to the purpose for which it may rely upon the out-of-court statements of K.J. and the detective, and the district court should clarify these instructions should this case proceed to a new trial on remand.

### **III.**

#### **CONCLUSION**

The district court did not violate Flegel's due process rights by permitting the state to amend the indictment to charge him with the lesser included offense of sexual abuse of the child without proceeding to a preliminary hearing or arraigning him on that charge prior to his second trial. The district court did not lose subject matter jurisdiction over the case after the jury acquitted Flegel of the lewd conduct charge contained in the indictment but failed to reach a verdict as to the lesser included offense of sexual abuse. The district court did not err when it denied, in part, Flegel's request to redact portions of the audio recording of the detective's interview of him. The district court did not subject Flegel to double jeopardy by retrying him on the lesser included offense of sexual abuse of a child. However, the district court committed fundamental error when it failed to instruct the jury that it could find Flegel guilty of sexual abuse only if it found that he had sexual contact not amounting to lewd conduct, and the error was not harmless. Accordingly, we vacate Flegel's judgment of conviction for sexual abuse of a child under the age of sixteen and remand for a new trial.

Chief Judge PERRY and Judge GUTIERREZ, **CONCUR.**